IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOEL PAUL REESMAN, Appellant.	No. 37520-6-II UNPUBLISHED OPINION

Hunt, J. –Joel Paul Reesman appeals (1) the firearm sentencing enhancement related to his bench trial conviction for unlawful possession of a controlled substance (methamphetamine),[1] and (2) his life sentence under the Persistent Offender Accountability Act (POAA).[2] He argues that (1) the evidence was insufficient to support the firearm enhancement because there was no evidence of a nexus between his possession of the firearm and his constructive possession of the methamphetamine, and (2) the trial court erred when it found his prior Oregon second degree robbery conviction legally comparable to a Washington strike offense[3] under the POAA.

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[1] The trial court found Reesman guilty of two counts of unlawful possession of a firearm, one count of unlawful possession of a short-barreled shotgun, and one count of unlawful possession of a controlled substance (methamphetamine). Reesman does not challenge any of his convictions.

[2] RCW 9.94A.570.

[3] A "strike offense" is a "[m]ost serious offense" defined in RCW 9.94A.030(32). RCW 9.94A.030(37)(a).

[4] We affirm the firearm sentencing enhancement and his POAA life sentence.

FACTS

I. Background

A. Initial Entry

Vancouver police officers obtained a warrant to search Joel Paul Reesman's residence for evidence of methamphetamine, methamphetamine distribution, and unlawful possession of firearms. To ensure that Reesman was present, they observed the residence for a period of time before entering. One officer saw Amber Blanchard, enter the residence carrying three purses or bags.

About an hour later, numerous officers, including a local SWAT team, entered the residence, and set off two "[n]oise/flash diversionary device[s]," one in the front and the other at the back, in the master bedroom. Two officers observed Reesman in the front of the residence as he headed towards the back bedroom; neither officer saw any weapons in Reesman's hands.

Another officer saw Reesman enter the bedroom, ordered Reesman onto the floor, and noticed that Reesman's hands were underneath him near his waistband, moving around as if attempting to push something down towards his knees. Although the officer ordered Reesman to

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[4] Reesman also filed a pro se Statement of Additional Grounds for Review (SAG), RAP 10.10, arguing only that he did not want to pursue appellate counsel's argument that his (Reesman's) waiver of jury trial was not proper. Treating this SAG argument as a motion to strike counsel's jury waiver argument from the opening Brief of Appellant, we granted the motion. *See* February 6 2006 Notation Ruling (Spindle). Reesman's appellate counsel subsequently submitted an amended brief that did not include this jury waiver argument. The State filed its Brief of Respondent before this we made this ruling; thus, the State addresses the stricken argument. Nonetheless, we do not reach this issue.

put his hands on his head, Reesman continued to move. After the officer repeated this order, Reesman complied. Although the officer did not see a gun in Reesman's hands, other officers who entered the bedroom found a silver handgun on the floor near Reesman's feet.

The officers also found three women, including Blanchard, in the bedroom. The officers took Reesman and the women into custody.

B. Search

The officers determined that the silver handgun was loaded. They also found a short-barrel shotgun next to a table just outside the kitchen. In Reesman's bedroom and bathroom, they found a metal spoon, a digital scale, and an iced tea can, all covered with methamphetamine residue, and used hypodermic needles.

The officers also searched the bags that Blanchard had brought into Reesman's residence. Inside one of the bags they found a .40 caliber semi-automatic pistol and a "half-loaded hypodermic needle" that they believed contained methamphetamine. Inside another bag, they found 9 mm ammunition that was compatible with the gun the officers had found at Reesman's feet.

C. Reesman's and Blanchard's Statements

Blanchard admitted that the .40 caliber pistol was hers. But she stated that (1) she did not know why the 9 mm ammunition was in her bag and believed it could have been there a long time; (2) Reesman had had the silver gun "on him" when the officers entered the residence; and (3) he had thrown the gun to the floor when he ran into the bedroom as the officers were entering the residence.

After receiving his *Miranda*[5] rights, Reesman told the officers that (1) the sliver gun was not his, but he had handled the gun; (2) he had thrown the gun and other some items off of a nearby table onto the floor when the officers entered the residence because he was trying to hide the gun to avoid being shot by the police;[6] (3) someone had injected him with methamphetamine in his bedroom on the night of the raid; (4) he and others had used the scale to weigh methamphetamine; and (5) he obtained his methamphetamine from "Mexicans through an intermediary person."

II. Procedure

The State charged Reesman with: two counts of first degree unlawful possession of a firearm based on his possession of a 9 mm pistol (count 1) and a short-barreled 12-gauge shotgun (count 2); unlawful possession of a short-barreled shotgun (count 3); and unlawful possession of a controlled substance, methamphetamine(count 4), with a firearm sentencing enhancement. In the same information, the State charged Blanchard with unlawful possession of methamphetamine (count 5) and second degree unlawful possession of a firearm (count 6).

Reesman pleaded not guilty and eventually agreed to a bench trial. Blanchard agreed to testify for the State and pleaded guilty to possession of methamphetamine with a firearm enhancement in exchange for a recommendation of 24 months prison time.

A. Bench Trial

[5] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[6] Reesman also denied owning the shotgun that the officers found.

The State presented numerous witnesses, most of whom were officers who had assisted in serving the search warrant or had collected evidence during the search. The officers testified as described above.

Blanchard testified for the State. She testified that she had known Reesman for a year. About an hour before the officers entered Reesman's residence, she had gone to his residence to pick up her cell phone from a friend and to offer her friend a ride. When she arrived, she noticed some people outside with a broken vehicle and it crossed her mind that they could be police. So when she entered the residence, she jokingly said that the "cops" were outside.

According to Blanchard, Reesman responded to her comment by looking out the sliding glass door to see if the police were there and stating that "if the police came there, he would do what he had to do." At this point, Reesman had a gun in his hand. Blanchard identified the gun that she had seen in Reesman's hand that night as the same gun the officers had found at Reesman's feet when they entered the bedroom.

Blanchard also testified that after she arrived at Reesman's residence, she obtained some methamphetamine from him, and injected it. She also observed another woman inject Reesman with methamphetamine. While they were injecting the drugs in the master bedroom, Reesman had the gun with him, in either his hand or his waistband. She saw Reesman drop the gun when the officers ordered them onto the floor in the master bedroom.

Reesman testified in his defense. He denied owning the silver gun and asserted that it was Blanchard's gun and that the first time he had seen her with it was January 9. He admitted that he had had the gun with him when he entered the bedroom as the police were entering the residence,

but he claimed that he had grabbed the gun, run down the hall with it, and then thrown it to the floor because he panicked and wanted to get the gun out of sight so the police would not shoot him.

The trial court found Reesman guilty of all counts and of the firearm enhancement. As to the firearm enhancement, the trial court made the following findings: (1) Blanchard's "testimony regarding the defendant being armed with the" silver gun was credible, (finding of fact 21); (2) Reesman was carrying the gun in his belt or his hand while he was in his residence being injected with methamphetamine and "while knowing methamphetamine was in his residence," (finding of fact 22); (3) on the night the officers executed the search warrant, Reesman told Blanchard that if the police came to or entered his residence, "he would do what he had to do," (finding of fact 23); (4) it was reasonable to infer from this statement that Reesman "intended to engage the police and to use his handgun against the police to prevent seizure of the methamphetamine and/or his person," (finding of fact 24); (5) the officers "ultimately" found Reesman "with the silver 9 mm handgun at his feet, in his bedroom" as they executed the search warrant, (finding of fact 25); (6) it was reasonable to infer "that [Reesman] would have used the handgun against the law enforcement officers but for the SWAT entry by the officers which prevented the defendant from doing so, which forced the defendant to drop the handgun" (finding of fact 26); (7) Reesman would have harmed the officers if not for the use of the SWAT team (finding of fact 27); (8) the facts established that the gun was easily accessible and readily available to Reesman for offensive or defensive purposes (finding of fact 27); and (9) Reesman was willing to use the gun "to protect his interest in the criminal activity occurring in his residence, the possessing of a controlled

substance—methamphetamine" (finding of fact 28).

Based on these findings, the trial court concluded that (1) Reesman was armed with a firearm while committing the crime of unlawful possession of methamphetamine, and (2) there was a nexus among Reesman, the gun, and the offense.

B. Sentencing

The State argued that the trial court should sentence Reesman to life imprisonment without the possibility of release as a persistent offender under the POAA. It asserted that Reesman's 1993 Lane County, Oregon guilty plea conviction for second degree robbery and his 1994 Linn County, Oregon guilty plea conviction for first degree armed robbery were comparable to Washington strike offenses.[7]

Reesman challenged the comparability of his 1993 Oregon second degree robbery conviction, arguing that the State had failed to establish that this offense was either factually or legally comparable to a Washington strike offense. The State responded that *State v. McIntyre*, 112 Wn. App. 478, 49 P.3d 151 (2002), was dispositive and that, under *McIntyre*, the trial court should rule that the 1993 Oregon second degree robbery conviction was legally comparable to a second degree robbery conviction under Washington law.

Reesman argued that the elements of second degree robbery in Oregon and second degree robbery in Washington are not comparable for "a while myriad of reasons." The trial court ruled that (1) *McIntyre* controlled and established that the two offenses were legally comparable; and

[7] At trial Reesman challenged the constitutionality of his 1994 first degree robbery guilty plea conviction (the trial court rejected this challenge). But he did not challenge its comparability below. On appeal, Reesman does not challenge the constitutionally or the comparability of the 1994 first degree armed robbery conviction.

(2) there was, therefore, no need to examine the facts underlying the Oregon offense. The trial court then found Reesman to be a persistent offender and sentenced him to life in prison without the possibility of release under the POAA.

Reesman appeals his firearm enhancement and his life sentence under the POAA.

ANALYSIS

I. Sufficient Evidence of Firearm Enhancement

Reesman first argues that the evidence was insufficient to support the firearm enhancement because there was no evidence of a nexus between his possession of the firearm and his methamphetamine possession. We disagree.

A. Standard of Review

When reviewing a challenge to the sufficiency of the evidence, we consider the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. *State v. Williams*, 137 Wn. App. 736, 743, 154 P.3d 322 (2007). We draw all reasonable inferences from the evidence in the State's favor and interpret the evidence "'most strongly against the defendant.'" *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). We consider circumstantial evidence to be as probative as direct evidence. *State v. Vermillion*, 66 Wn. App. 332, 342, 832 P.2d 95 (1992), *review denied*, 120 Wn.2d 1030 (1993). And we defer to the trier of fact to resolve any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of the witnesses. *State v. Boot*, 89 Wn. App. 780, 791, 950 P.2d 964, *review denied*, 135 Wn.2d 1015 (1998).

B. Nexus

"[T]o establish that a defendant was armed for purposes of the sentencing enhancement, the State must prove that a weapon was easily accessible and readily available for use and that there was a nexus or connection between the defendant, the crime, and the weapon." *State v. Eckenrode*, 159 Wn.2d 488, 490-91, 150 P.3d 1116 (2007) (citing *State v. Gurske*, 155 Wn.2d 134, 138-39, 118 P.3d 333 (2005); *State v. Barnes*, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005)). Reesman argues that there was no evidence of a nexus or connection between his possession of the firearm and the crime of possession of methamphetamine because (1) he was not in actual possession of the methamphetamine at the same time he possessed the gun, and (2) there was nothing showing that he planned to use the firearm to protect what amounted to mere methamphetamine residue. We disagree.

The trial court found that (1) Reesman was in physical possession of the gun while he used methamphetamine; (2) while in possession of the gun, Reesman knew that the drugs were in the house; and (3) Reesman made statements to Blanchard indicating that he was willing to use the gun to prevent the police from entering his home. Because Reesman does not challenge these findings, they are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) (citing *Tomlinson v. Clarke*, 118 Wn.2d 498, 501, 825 P.2d 706 (1992); *Riley v. Rhay*, 76 Wn.2d 32, 33, 454 P.2d 820, *cert. denied*, 396 U.S. 972 (1969)). Based on these factual findings, the trial court reasonably concluded that these circumstances demonstrated Reesman was willing to use the gun to prevent the police from confiscating any drugs in the home or arresting him on any drug related charges.

We agree with the trial court that these findings demonstrate a nexus between Reesman's possession of the firearm and his possession of the methamphetamine: He intended to use the firearm to ensure his continued possession of the drugs in his home at the time he possessed and used the methamphetamine. Accordingly, Reesman's nexus argument fails.

II. Comparability of Foreign Conviction

Reesman next argues that the trial court erred when it determined that his 1993 Oregon second degree robbery conviction was equivalent to a Washington strike offense under the POAA. He contends that the 1993 Oregon second degree robbery statute is broader than the Washington second degree robbery statute because the Oregon statute does not require the defendant to take the property "from the person of another or in his presence against his will."[8] Br. of Appellant at 25-26. The State counters that we previously resolved this issue, adverse to Reesman, in *McIntyre*. We agree with the State.

[8] Reesman argues that his 1993 Oregon second degree robbery conviction is not legally comparable to second degree robbery under Washington law because (1) Washington law requires that the defendant take the property in question from the "person" of the victim or in the physical presence of the victim, but (2) the Oregon robbery statutes do not contain this same requirement. Br. of Appellant at 26. In support of this argument, he provides an example in which, by threat of violence, a defendant compels a property owner at one location to do an act that facilitates the defendant's accomplice's act of unlawfully taking the property at a different location. This argument fails under *McIntyre*.

A. Legal Comparability of Strike Offenses

A defendant who has been convicted of two "most serious offenses," commonly referred to as "strike offenses," must be sentenced to life without parole upon conviction for a third such offense. RCW 9.94A.030(37); RCW 9.94A.570. Convictions from other jurisdictions count as strikes if they are comparable to Washington's most serious offenses. RCW 9.94A.030(37)(a)(ii). The purpose of this statute is to ensure that defendants with equivalent prior convictions are treated the same way, regardless of where they committed these offenses. *See State v. Villegas*, 72 Wn. App. 34, 38-39, 863 P.2d 560 (1993), *review denied*, 124 Wn.2d 1002 (1994).

Our Supreme Court has devised a two-part test to determine whether a foreign conviction is comparable to a Washington offense. *State v. Morley*, 134 Wn.2d 588, 605-606, 952 P.2d 167 (1998) (citations omitted). Under this two-part test, we consider a foreign conviction to be equivalent to a Washington offense if there is either legal *or* factual comparability. *See In re Personal Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005) (citing *Morley*, 134 Wn.2d at 605-06). "We review a challenge to the classification of an out-of-state conviction de novo." *State v. Labarbera*, 128 Wn. App. 343, 348, 115 P.3d 1038, 1041 (2005) (citing *State v. McCorkle*, 88 Wn. App. 485, 493, 945 P.2d 736 (1997), *aff'd*, 137 Wn.2d 490 (1999).

Generally, we first examine the legal comparability of the foreign offense and the arguably comparable Washington offense.[9] *See Lavery*, 154 Wn.2d at 255 (citing *Morley*, 134 Wn.2d at

[9] If the elements of the foreign crime are not substantially similar to the analogous Washington crime, or if the foreign law is broader than Washington's definition of a particular crime, the sentencing court may look to factual comparability, the second prong of the test. *Lavery*, 154 Wn.2d at 255-56; *Morley*, 134 Wn.2d at 606. Because *McIntyre* is dispositive of the legal comparability prong of the test, we do not reach this second factual prong.

605-06). "Legal comparability" means that the elements of the foreign conviction are substantially similar to the elements of a Washington crime. *Lavery*, 154 Wn.2d at 255 (citing *State v. Morley*, 134 Wn.2d 485, 606, 945 P.2d 736 (1997). Thus, when a foreign crime provides alternative elements, it must contain all the elements of its Washington counterpart to be considered legally comparable. *State v. Russell*, 104 Wn. App. 422, 442, 16 P.3d 664 (2001).

B. Washington and Oregon Robbery Statutes

Washington law classifies second degree robbery as a most serious offense. RCW 9.94A.030(32)(o). Under Washington law, a person is guilty of second degree robbery if he commits robbery. RCW 9A.56.210(1). RCW 9A.56.190 defines "robbery" as follows:

> A person commits robbery when he unlawfully takes personal property *from the person of another or in his presence* against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

(Emphasis added).

When Reesman committed the 1993 Lane County, Oregon second degree robbery, Oregon law defined "second degree robbery" as follows:

> A person commits the crime of robbery in the second degree if the person [commits third degree robbery under] ORS 164.395 and the person:
>
> (a) Represents by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon; or
>
> (b) Is aided by another person actually present.

ORS § 164.405(1). Thus, to be convicted of second degree robbery in Oregon, a defendant must

be guilty of third degree robbery and one or more of the two aggravating factors above. At the time of the offense at issue here, Oregon law defined "third degree robbery" as follows:

> (1) A person commits the crime of robbery in the third degree if in the course of committing or attempting[10] to commit theft or unauthorized use of a vehicle as defined in ORS 164.135 the person uses or threatens the immediate use of physical force upon another person with the intent of:
>
> (a) Preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or
>
> (b) Compelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft or unauthorized use of a vehicle.

ORS § 164.395(1).[11] Under these statutory definitions, if third degree robbery in Oregon is comparable to second degree robbery in Washington, then an Oregon second degree robbery is also comparable to a Washington second degree robbery.

In *McIntyre*, we held that an Oregon third degree robbery conviction is legally comparable to a Washington second degree robbery conviction because "[b]oth statutes require (a) a theft; (b) the use or threatened use of immediate force or fear of injury; and ([c]) [that] the force or fear be used to obtain or retain the property." *McIntyre*, 112 Wn. App. at 481. We specifically stated that the Washington second degree robbery statute does not require that the defendant use force

[10] Although the Washington robbery statute requires the taking of property, rather than an *attempt* to take property, we note that the POAA treats anticipatory offenses the same as completed offenses. *See* RCW 9.94A.030(32) (a most serious offense includes specific felonies or felony attempts to commit those offenses); *State v. Nordlund*, 113 Wn. App. 171, 191, 53 P.3d 520 (2002), *review denied*, 149 Wn.2d 1005 (2003). Reesman does not argue that the presence of the attempt alternative under Oregon law affects the comparability analysis here.

[11] In 2003, the Oregon legislature amended this statute to include the phrase "or unauthorized use of a vehicle as defined in ORS 164.135," after the word "theft" in the first sentence and the last sentence of (1)(b). *See* 2003 Laws of Oregon, ch. 357, § 1. Although this amendment took place well after Reesman committed his1993 Oregon second degree robbery, the amendment does not affect our analysis.

to obtain the property; rather, the use of force to retain possession of the property is sufficient. *Id*. at 482-83. We discern no relevant distinction between Reesman's argument and the argument we addressed and rejected in *McIntyre*.[12]

We hold, therefore, that the trial court did not err when it ruled the Oregon and Washington second degree robbery offenses to be legally comparable and used Reesman's 1993 Oregon robbery conviction as a strike offense for purposes of sentencing him under the POAA.

Accordingly, we affirm Reesman's sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Hunt, J.

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Bridgewater, P.J. Quinn-Brintnall, J.

[12] Concluding that the Washington statute was not narrower than the Oregon statute, we rejected McIntyre's argument that under the Oregon law someone could be convicted for third degree robbery if he shoplifted something from a store, left the store, was confronted by a security guard, and then fled, but that this would not amount to second degree robbery in Washington because "he did not take the property from another or against his will by the use or threatened use of force." *McIntyre*, 112 Wn. App. at 481.